

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ALEJANDRO MENDOZA**

Claimant

VS.

**DCS SANITATION**

Respondent

AND

**ZURICH U.S. INSURANCE COMPANY**

Insurance Carrier

Docket No. 1,008,559

**ORDER**

**STATEMENT OF THE CASE**

Claimant fell and injured his right ankle on December 5, 2002, while walking across a parking lot towards respondent's office to pick up his paycheck. In a December 2, 2005, Award, Administrative Law Judge Pamela J. Fuller denied claimant's request for benefits after finding that claimant's accident did not arise out of and in the course of his employment with respondent. This Board affirmed that Award in its April 26, 2006, Order.

Claimant, however, appealed the Board's April 26, 2006, Order to the Kansas Court of Appeals. And in its decision dated March 9, 2007, the Kansas Court of Appeals determined claimant's accident arose out of and in the course of his employment with respondent. The Court of Appeals reasoned that claimant's trip to the employer's off-worksite location to pick up a paycheck fell within the work-related errand exception to the going and coming rule and, therefore, the injury sustained during such trip is compensable under the Workers Compensation Act. Accordingly, the Court of Appeals remanded this claim to the Board to address claimant's request for workers compensation benefits.

**APPEARANCES**

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Richard L. Friedeman of Great Bend, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the December 2, 2005, Award entered by Administrative Law Judge Pamela J. Fuller.

**ISSUES**

This remand only pertains to the workers compensation benefits claimant is entitled to receive as a result of his December 5, 2002, accident.

Claimant contends he is entitled to receive two weeks temporary total disability benefits in the sum of \$459.96 and permanent disability benefits for a 15 percent functional impairment to the right lower extremity, which is the functional impairment rating provided by claimant's medical expert witness, Dr. Pedro A. Murati. Finally, claimant requests payment of outstanding medical bills in the sum of \$3,676.75, reimbursement for prescription expense in the sum of \$28.36, reimbursement of unauthorized medical benefits in the sum of \$500, and that his rights to request both additional medical benefits and review and modification of his award be preserved.

Respondent and its insurance carrier contend claimant's permanent disability benefits should be based upon an 11 percent lower extremity rating, which was provided by Dr. C. Reiff Brown. They do not challenge claimant's other requests.

In short, the only issue before the Board on this remand is the percentage of functional impairment claimant sustained as a result of his December 5, 2002, accident.

**FINDINGS OF FACT**

After reviewing the record and considering the parties' arguments, the Board finds:

On December 5, 2002, claimant fell after he parked his car and began walking towards respondent's office to pick up his paycheck. As a result of the fall, claimant fractured his right ankle.

On the day of his accident, claimant underwent surgery to address his ankle fracture. The following month, claimant underwent a second surgery to remove the hardware that was used in the first operation. After a healing period, claimant eventually returned to work for respondent despite ongoing problems with pain and swelling.

Claimant's attorney requested Dr. Pedro A. Murati to examine and evaluate claimant for purposes of this claim. Dr. Murati, who is board-certified in physical medicine and rehabilitation, electrodiagnostic medicine, and independent medical evaluations, examined claimant in late September 2004. The doctor diagnosed right ankle pain status post right

ankle open reduction internal fixation of the distal fibula fracture and reduction of the syndesmosis and fixation with syndesmosis screw repair of the deltoid ligament tear.

Using the fourth edition of the *AMA Guides*,<sup>1</sup> Dr. Murati rated the impairment in claimant's right lower extremity. The doctor found claimant had 11 percent for loss of the right ankle's range of motion, 2 percent for decreased sensation to the right distal saphenous nerve, and 2 percent for decreased sensation to the right sural nerve, all of which combine for a 15 percent right lower extremity impairment.<sup>2</sup>

But Dr. Murati admitted on cross-examination that one portion of the *Guides* rated complete sensory loss to those nerves at 2 percent for each, whereas claimant had only partial sensory loss.<sup>3</sup> On the other hand, the doctor noted a different portion of the *Guides* provides a method for rating partial sensory loss.<sup>4</sup> The doctor also noted there was a possibility the decreased sensation in claimant's distal saphenous nerve may have been caused by a saphenous vein graft from the right lower extremity that preceded claimant's accident.<sup>5</sup> Claimant, however, denied having numbness in his foot following the saphenous vein graft.

Finally, Dr. Murati testified that taking out the impairment for either the distal saphenous or sural nerve would leave claimant with a 13 percent impairment to the lower extremity and that taking out the impairment for both nerves would leave claimant with an 11 percent lower extremity impairment.

Respondent and its insurance carrier requested Dr. C. Reiff Brown to examine and evaluate claimant. Dr. Brown, who is board-certified in orthopedic surgery, examined claimant in early August 2005. Dr. Brown concluded as a result of the December 2002 accident claimant suffered a severe right ankle fracture, which included a distal fibular fracture with lateral displacement causing a rupture of the syndesmotic ligaments and the medial collateral ligaments.

Dr. Brown rated claimant as having an 11 percent impairment to the right lower extremity, which includes 4 percent for loss of range of motion in the foot or ankle, 5 percent

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

<sup>2</sup> Murati Depo. at 11.

<sup>3</sup> *Id.* at 19.

<sup>4</sup> *Id.* at 30.

<sup>5</sup> *Id.* at 25.

for crepitus, and 2 percent for sensory deficit of the saphenous nerve.<sup>6</sup> Dr. Brown was not specifically asked if he utilized the fourth edition of the *Guides* to rate claimant. But the doctor did refer to the *Guides* when discussing the loss of motion on eversion.<sup>7</sup>

Considering the entire record, the Board finds both doctors rated claimant's right lower extremity using the fourth edition of the *Guides*. The Board is not persuaded that Dr. Murati's 15 percent rating is any more correct than Dr. Brown's 11 percent rating. Consequently, the Board averages those ratings and finds that claimant has sustained a 13 percent impairment to his right lower extremity as a result of his December 2002 accident.

#### **PRINCIPLES OF LAW**

For the permanent partial loss of use of a finger, thumb, hand, shoulder, arm, forearm, toe, foot, leg or lower leg, an injured worker is entitled to receive permanent disability benefits under the schedules of K.S.A. 44-510d. Subsection (a)(15) of that statute provides that a worker is entitled to receive 190 weeks of benefits for the total loss of a lower leg. When there is only a partial loss of the body part that is listed in the schedules, the number of weeks of permanent disability benefits payable for that partial loss is computed by multiplying the percentage of the impairment the worker sustained by the number of weeks that compensation would be payable for a total loss of the body part in question.<sup>8</sup>

#### **ANALYSIS**

Claimant has sustained a 13 percent impairment to his right lower extremity. Therefore, he is entitled to receive permanent disability benefits under the schedules of K.S.A. 44-510d. Claimant's injury is to his lower leg for which the schedules provide a maximum of 190 weeks. Consequently, after deducting 2 weeks of temporary total disability benefits from 190 weeks, the remainder is multiplied by 13 percent to yield 24.44 weeks of permanent disability benefits claimant is entitled to receive as a result of his December 2002 accident.<sup>9</sup>

#### **CONCLUSIONS OF LAW**

Claimant sustained a 13 percent impairment to his right lower extremity. The situs of claimant's injury is to his right foot and ankle. Under these facts, the scheduled injury

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<sup>6</sup> Brown Depo. at 10.

<sup>7</sup> *Id.* at 12.

<sup>8</sup> See K.S.A. 44-510d(a)(21).

<sup>9</sup> See K.A.R. 51-7-8.

statute, K.S.A. 44-510d, provides that a worker is entitled to receive 190 weeks of permanent disability benefits for the complete loss of a lower leg and 24.44 weeks of permanent disability benefits for a 13 percent impairment to that portion of the body.

**AWARD**

**WHEREFORE**, the Board grants claimant permanent disability benefits for a 13 percent impairment to the right lower extremity, \$459.96 in temporary total disability benefits, \$28.36 in reimbursement of prescription expense, \$500 in unauthorized medical benefits, and \$3,676.75 in unpaid medical expense.

Alejandro Mendoza is granted compensation from DCS Sanitation for a December 5, 2002, accident and resulting disability. Based upon an average weekly wage of \$344.95, Mr. Mendoza is entitled to receive 2 weeks of temporary total disability benefits at \$229.98 per week, or \$459.96, plus 24.44 weeks of permanent partial disability benefits at \$229.98 per week, or \$5,620.71, for a 13 percent permanent partial disability, making a total award of \$6,080.67, which is all due and owing less any amounts previously paid.

Future medical benefits may be considered upon proper application to the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant  
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge